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No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1962

CLUB RAMON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LOUIS F. OBERDORFER,
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Raymond O. Matte owns substantially all the stock of the petitioner corporation and, through it, owns and operates the Club Ramon in Bluefield, West Virginia. The Club provides dancing facilities and sells food and alcoholic beverages. West Virginia law forbids the sale or consumption of alcoholic beverages in a "public" place, but the petitioner purports to operate, as described in its charter, a "private dinner and supper club." The front door is kept locked

and, with some exceptions, only persons bearing "membership" cards and their guests are admitted. Issuance of membership cards is controlled entirely by Matte, who issues them upon the recommendation of another cardholder or upon the request of the applicant himself. No formal application is required; no dues are paid;* and the "members" have no voice in the management of the Club or any right to share in its assets or profits. The Club is admittedly a commercial enterprise operated solely for private profit.

The court of appeals, setting aside a jury verdict for petitioner, held that the Club constituted a "cabaret * * * furnishing a public performance for profit" within the meaning of § 1700(e) of the Internal Revenue Code of 1939 and hence that petitioner was liable for the so-called "cabaret tax" imposed by that section. Petitioner contends, as the sole basis for certiorari, that the holding that the Club was a "public" rather than "private" place is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Lambeth*, 176 F. 2d 810, in which the court refused to set aside a contrary finding of a trial court on somewhat similar facts.

The *Lambeth* case, in our view, was erroneously decided, and we would welcome the opportunity to

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* One witness stated that he had at one time paid a $10 fee but that he did not know whether it was dues or rent for a locker in which he kept a liquor bottle (R. 283-285). Matte testified, however, that he had never charged dues (R. 231).

have it overturned by this Court. Proprietors generally have the right to exclude persons seeking admission, and that that right is exercised in the form of giving admission cards (so-called "membership" cards) to those the proprietor chooses to admit cannot, by itself, be enough to make the establishment nonpublic in the statutory sense. We do not believe, however, that there exists between the decision below and the *Lambeth* case a conflict of the sort required to warrant review by this Court.

The court in the *Lambeth* case made no attempt to define "public" as used in the statute and held simply that, on all of the facts of that case, the finding of the trial court that the establishment was not "public" was not clearly erroneous. A decision so based—simply an *ad hoc* application of an undefined statutory term to particular facts—carries little force beyond its precise facts, and even a slight variation in the facts precludes a "conflict" in the strict sense required to justify review by this Court of such a narrow and relatively unimportant tax question. Such a difference of facts exists here. In *Lambeth*, one could become a "member" only by paying $3 annual dues ($0.50 for servicemen); in this case, there was no requirement for the payment of "dues". We do not contend that such a nominal dues requirement should be determinative; rather we agree with the court below that *Lambeth* is wrong notwithstanding that difference. It remains, nevertheless, a factual difference on which a difference of result might be predicated and it is therefore sufficient to preclude a claim of conflict.

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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Attorneys.

March, 1962.

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